United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

75-7128

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

JUAN SANCHEZ LUGO,

Plaintiff-Appellant,

-against-

THE EMPLOYEES RETIREMENT FUND OF THE ILLUMINATION PRODUCTS INDUSTRY, CHARLES F. ROTH, individually and in his capacity as Assistant Executive Secretary of the Employees Retirement Fund of the Illumination Products Industry, and KENNETH CEPPOS, SIMON GRAFSTEIN, LEONARD GOLUB, HANNIBAL IMBRO, JOHN H. KLIEGL II, EDWARD R. MURPHY, JERRY SCHNEIT, ROWLAND J. SIMES, MEYER TEITELBAUM, WALTER WEISS, ALBERT BAUER, SOL BERMAN, JOSEPH BONO, STEPHEN KANYOOSKY, KAREL MRNKA, JOHN SCIACCA, LOUIS STEIN, THOMAS VAN ARSDALE, HARRY VAN ARSDALE, JR., and SANTOS ZAPPATA as trustees of the Employees Retirement Fund of the Illumination Products Industry,

Defendant-Appellees.

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APPELLANT'S REPLY BRIEF

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PRELIMINARY STATEMENT

This is an appeal from a final order after trial of the United States District Court for the Eastern District of New York, dismissing Appellant's complaint. Appellant filed his brief in this Court on June 30, 1975. This brief is written in reply to the brief of Appellees dated July 29, 1975.

ARGUMENT

POINT I

THE DISTRICT COURT HAD JURISDICTION TO HEAR THIS ACTION

A. The District Court Had Jurisdiction under Section 302(e) of the Taft-Hartley Act.

Appellees (hereinafter defendants) contend that the District Court lacked subject matter jurisdiction over Appellant's (hereinafter plaintiff) claims. This is not the case.

The defendant retirement fund is a pension trust fund financed by employer contributions and as such is subject to the requirements of §302 of the Taft-Hartley Act, 29 U.S.C. §186. Section 302(c)(5) requires that such plans be operated "...for the sole and exclusive benefit of the employees of such employer, and their families and dependents...[or of such persons in his employ or in the employ of others making similar contributions]." Section 302(e) of the Taft-Hartley Act provides in pertinent part that:

> The District Court of the United States...shall have jurisdiction for cause shown, and subject to the provisions of section 381 of Title 28 (relating to notice to opposite party) to restrain violations of this section...."
> 29 U.S.C. §186(e)

Plaintiff's complaint addressed two basic deficiencies in the defendant retirement fund:

(1) the procedures used for the determination of claims for disability pensions violate the Taft-Hartley Act (see Point I of appellant's brief); and (2) the 90/10 rule is an invalid eligibility requirement under the Act (see Point III of appellant's brief). (A-9-10). Plaintiff further asserts that these deficiencies caused the plan to be one not operated for the sole and exclusive benefit of the employees and therefore in violation of Section 302(c)(5).

In September, 1973, defendants moved the District Court to dismiss plaintiff's complaint for lack of subject matter jurisdiction. The District Court denied this motion in all respects, Lugo v. Employees Retirement Fund, 366 F.Supp. 99 (E.D.N.Y., 1973), (A-15), finding that federal subject matter jurisdiction existed over plaintiff's claims pursuant to §302(e) of the Taft-Hartley Act, 29 U.S.C. §186(e).

In so doing, the District Court followed a line of cases which have held that there is "a distinction between actions involving 'structural' deficiencies in the relevant trust which cause it to violate the "sole and exclusive benefit" provision of §302(c)(5) [of the Taft-Hartley Act] and actions involving only questions of day-to-day fiduciary administration of welfare and pension funds. Section 302(e), these cases say, provides jurisdiction over the former but not the latter." Alvares v. Erickson, __F.2d__, (9th Cir., 1975); 34 BNA Pension Rptr. D-1, 5/12/75. See also Bowers v. Ulpiano Casal, 393 F.2d 421 (1st Cir., 1968);

Insley v. Joyce, 330 F.Supp. 1228 (N.D. Ill., 1971); Giordani v. Hoffman, 295 F.Supp. 463 (E.D. Pa., 1969); Porter v. Teamsters, etc. Funds, 321 F.Supp. 101 (E.D. Pa., 1970).

Plaintiff's claims in this case clearly set forth structural violations of the Taft-Hartley Act. In this regard, the Court's attention is respectfully referred to both Appellant's Brief and the opinion of the District Court (A-15-19) which provide more than ample support for this contention.

Contrary to the assertion of defendants (Defendants' Brief, pp. 6-7), the District Court at no time based jurisdiction on the assumption that a Taft-Hartley pension plan need treat "all" of the employees equally despite the use of the word "all" in its opinion on jurisdiction (A-19). When defendants raised this use of the word "all" at trial, the District Court replied that:

> I don't think I said that in any other case or any other context so I believe that was simply a slip. I didn't mean anything more than I did when I referred to 306C5*(sic) which says the trust fund is established "for the sole and exclusive benefit of the employees of such employer." (A-345)
>
> There's nothing wrong with the use of the word "all." That doesn't mean the plan has actually to immediately benefit all the employees because some of the

*Judge Bartels actually said 302(c)(5).

> younger employees may never be able to satisfy the eligibility requirements. They may never get any benefits.
> (A-346)
>
> That isn't what we are talking about. We're talking about the potentiality, that potentiality must be there to show all the employees will benefit, can benefit.
> (A-346-347).

Since it is clear that a federal district court has jurisdiction over claims such as plaintiff's, it is unnecessary to decide "whether the structural deficiency versus administrative dichotomy is a sound basis for limiting...jurisdiction." Alvares v. Erickson, supra, at __; 34 BNA Pension Rptr. D-1, D-5 (ftn. 5), 5/12/75. Nonetheless, the District Court adopted this limitation. While this position should not affect plaintiff's case in any way, plaintiff disputes that jurisdiction under §302(e) is so limited. It must be stressed that jurisdiction rests on a broader base. This position is supported by a well /reasoned line of cases, which hold that federal courts have general jurisdiction under 302(e) over all cases pertaining to §302 pension plans. The policy rationale which supports these decisions rests upon the fundamental purpose of the federal labor laws to establish and maintain uniformity in the area of federal labor law, so that national industries can expect and receive consistent results in labor cases without regard for the vagaries of local law. This rationale is developed and explained in two major Supreme Court decisions.

In Textile Workers Union v. Lincoln Mills of Alabama, 353 U.S. 448 (1957), the Supreme Court held that §301(a) of the Taft-Hartley Act not only granted federal courts jurisdiction over suits to enforce collective bargaining agreements but also imposed upon federal courts the affirmative duty to fashion a body of federal common law to be applied in such actions.

The Court stated, "we conclude that the substantive law to be applied in suits under §301(a) is federal law, which the Courts must fashion from the policy of our four national labor laws." Id., at p. 456. To the same effect, see Lewis v. Benedict Coal Co., 361 U.S. 459, 470 (1960). In exactly the same fashion §302(e) gives federal courts both jurisdiction over and authority to fashion a body of common law for the enforcement of the general requirements of the remainder of §302, including §302(c)(5). See Raymond v. Hoffman, 284 F.Supp. 596 (E.D. Pa., 1966).

Pursuant to §302(e) the federal courts have found jurisdiction to consider a great variety of complaints with the administration of covered plans. See, e.g., Copra v. Suro, 236 F.2d 107, 115 (1st Cir., 1956); In Re Bricklayers Local #1 of Pa. Welfare Fund, 159 F.Supp. 37 (E.D. Pa., 1958); Upholsterer's Int'l Union v. Leathercraft Furniture Co., 82 F.Supp. 870 (E.D. Pa., 1949); Barbot v. Frackman, 191 F.Supp. 171 (S.D.N.Y., 1961).

Courts have often found jurisdiction in actions by beneficiaries alleging that the trusts were not being

administered "for the sole and exclusive benefit of the employees" because the trustees had acted arbitrarily and capriciously in denying a pension. See, e.g., Insley v. Joyce, supra; Lee v. Nesbitt, 453 F.2d 1309 (9th Cir., 1971).

Wilkens v. Dekoning, 152 F.Supp. 101 (E.D.N.Y., 1957), demonstrates how far the courts have been willing to go to find jurisdiction and fashion relief for violations of §302. There, plaintiff had asked to inspect the annual audits of the pension trust fund pursuant to §302(c) and had shown material concerning the fund to his attorney. Subsequently he was charged with misconduct by the union and was to be tried. Plaintiff brought a federal action seeking said inspection and requested an injunction of the union trial pending a decision. The court, in granting the injunction, found that while it was not to restrain a violation of §186(c), it was in furtherance of the statutory purpose since it prevented union disciplinary action against an "interested person" for exercising his legal right.

This Court has considered a number of cases concerning §302(c)(5) of the Taft-Hartley Act: Moglia v. Geoghegan, 403 F.2d 110 (2nd Cir., 1969); Beam v. Int'l Org. of Masters, Mates and Pilots, 511 F.2d 975 (2nd Cir., 1975); and Cuff v. Gleason, 515 F.2d 127 (2nd Cir., 1975). None of these cases, however, deals with jurisdiction pursuant to §302(e), rather, each concerns the issue of whether or not §302 supplies jurisdiction pursuant to 28 U.S.C. §1337. Thus, the issue of jurisdiction pursuant to §302(e) has never been decided by this Court.

B. Defendants' Argument in Support of the Premise that Subject Matter Jurisdiction Is Lacking Is Inaccurate.

Defendants cite deLoraine v. MEBA, 74 CIV 4427, 11/20/73, Tyler, J., (N.O.R.) (S.D.N.Y., 1973); aff'd on other grounds, 499 F.2d 49 (2nd Cir., 1974), as authority for the premise that federal subject matter jurisdiction is lacking* This contention is without merit. First, Judge Tyler specifically distinguishes deLoraine from Judge Bartels' jurisdictional decision in Lugo. deLoraine, supra, at 6-8. Second, in finding that at most, plaintiff alleged misadministration by the trustees, Judge Tyler ruled that "[s]ince no structural defect in the establishment of this pension trust has been alleged, this court lacks subject matter jurisdiction." Id., at 9.

Thus, since structural defects are at issue here, the only problem which the deLoraine decision may pose is the statement that jurisdiction only lies if "it is alleged that the trust was not 'established' for the sole and exclusive benefit of the employees," Id., at 5; i.e., an attack must be made upon "the agreement between the employer and the union pursuant to which the pension trust was created." Id.

It is respectfully submitted that this contention is in error. The United States Supreme Court, in a case

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*Defendants' citation for deLoraine, at page 6 of their brief, i.e., 355 F.Supp. 89, is incorrect. This citation is to Judge Tyler's original decision in that case with respect to deLoraine's claim under the Age Discrimination in Employment Act of 1967. The quotation is from the subsequent decision of November 11, 1973, which is not officially reported.

involving criminal liability of a trustee of a Taft-Hartley trust, stated:

> [s]pecific standards [set forth in §302(c)(5)] were established to assure that welfare funds would be established only for the purposes which Congress considered proper and extended only for the purposes for which they were established. Continuing compliance with these standards in the administration of welfare funds was made explicitly enforceable in federal district courts by civil proceedings under §302(e). Arroyo v. United States, 359 U.S. 419, 426-427 (1959) (emphasis supplied) (citation omitted).

In this vein, the District Court for the Eastern District of Pennsylvania held that

> claims relating to structural violations need not be directed to the point in time when the trust funds were created and the first contributions made. To so hold would create grave problems. Let us suppose, for example, that a trust fund is created and initially administered in accordance with the structural requirements of §302(c)(5). If at some future point during the trust fund's existence it were either amended or administered in such a way as not to comply with these provisions, such would be a structural violation over which this court would have jurisdiction under §302. Such a conclusion is necessary to protect the beneficiaries and the funds previously paid into the trust.
> Porter v. Teamsters Health, W&L Ins. Funds of Phila., 321 F.Supp. 101, 103-104 (E.D. Pa., 1970).

Defendants also assert that "Judge Bartels has now adopted Judge Tyler's view and declined to take jurisdiction

herein (A344-347,* 404-407)." (Defendants' Brief, p. 7) This is totally incorrect. Judge Bartels' first conclusion of law in his decision dismissing the complaint states:

> [t]he court has jurisdiction under §302(e) of the Act to determine whether the provisions of the Agreement here challenged constitute structural defects in violation of §302(c)(5) of the Act. (A-404).

Finally, since Judge Bartels ruled on the merits of plaintiff's claims, he could not have "declined to take jurisdiction." The fact that he found "that plaintiff has failed to establish any structural defects in the Fund constituting violations of the Act" (A-407) can be deemed in no way to undermine the court's jurisdiction to make that determination. Bell v. Hood, 327 U.S. 678 (1946).

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*See pages 4-5, supra.

POINT II

NOTWITHSTANDING DEFENDANTS' ARGUMENTS, HEARINGS ARE REQUIRED FOR THE DETERMINATION OF ELIGIBILITY FOR DISABILITY BENEFITS

In support of their assertion that plaintiff was not deprived of due process, defendants raise a number of incorrect contentions. First, defendants state that "plaintiff was carefully examined by a panel of the Fund's physicians." (Defendants' Brief, p. 9). The record is devoid of any testimony concerning any aspect of this examination. Second, it is asserted that "[s]ince plaintiff's physician has not contended that the plaintiff is disabled, that issue is moot." (Id., p. 10) This is clearly erroneous; plaintiff's physician merely set forth in a succinct manner some of plaintiff's ills; she made no evaluation whatsoever of plaintiff's physical abilities (A-188-189). Third, defendants allege that a "requirement of a hearing for every applicant who claimed to be disabled would be analogous to a requirement that every litigant who files a frivolous action in court is entitled to a trial by jury." (Id.) This contention is totally without substance. Plaintiff seeks a hearing on the issue of disability only. Obviously, there are certain questions relating to eligibility which might be resolved without a hearing, e.g., periods of covered employment, because testimony would supply nothing in addition to material contained in documentary evidence. A claimant's physical condition and limitations however are matters which can best be resolved by means of his direct testimony and cross examination of adverse witnesses.

Plaintiff, in this regard, asserts "his right to be heard before being condemned to suffer grievous loss" (Joint Anti-Fascist Refugee Committee v. McGrath 341 U.S. 123, 168 (1951), Frankfurter, J., concurring) - his right to a disability pension.

Finally, in support of all of their contentions, defendants offer the case of Richardson v. Perales, 402 U.S. 389 (Defendants' Brief, p. 9). This opinion was written by Mr. Justice Blackman* and involved a denial of Social Security disability benefits to Perales based on medical reports which had been introduced into evidence at the hearing over an objection by claimant's attorney that they constituted hearsay. Id., at 395. The Fifth Circuit upheld the claimant's position, Richardson v. Perales, 412 F.2d 44 (5th Cir., 1970) and the Supreme Court granted certiorari.

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*Defendants mistakenly state that Mr. Justice Douglas wrote this opinion. In point of fact, Mr. Justice Douglas joined by Mr. Justice Black and Mr. Justice Brennan, dissented saying that:

> [t]he use by HEW of its stable of doctors without submitting them to cross-examination is the cutting of corners - a practice in which the Government should not indulge. The practice is barred by the rules which Congress has provided; and we should enforce them in the spirit in which they were written.
> Id., at 414.

In reversing the decision of the Fifth Circuit, the Supreme Court held:

> It is to be noted at this point that §205(d) of the Act [Social Security Act], 42 U.S.C. §405(d), provides that the Secretary has power to issue subpoenas requiring the attendance and testimony of witnesses and the production of evidence and that the Secretary's regulations authorized by §205(a), 42 U.S.C. §405(a), provide that a claimant may request the issuance of subpoenas, 20 C.F.R. §404.926. Perales, however, who was represented by counsel, did not request subpoenas for either of the two hearings. Richardson v. Perales, 402 U.S. 389, 397 (emphasis added)

As such, the Court concluded:

> that a written report by a licensed physician who has examined claimant and who sets forth in his report his medical findings in his area of competence may be received as evidence in a disability hearing and, despite its hearsay character and an absence of cross-examination and despite the presence of opposing direct medical testimony and testimony by the claimant himself, may constitute substantial evidence of a finding by the hearing examiner adverse to the claimant, when the claimant has not exercised his right to subpoena the reporting physician and thereby provide himself with the opportunity for cross-examination of the physician.
> Id. at 402 (emphasis added).

It is clear that the finding in Richardson presents no obstacle to the relief requested by plaintiff herein, but rather, supports it.

Defendants' mistaken reliance on Richardson occurs due to the use of a quotation out of context. (Appellees' Brief, p. 9). The full quotation is:

> [w]ith over 20,000 disability claim hearings annually, the cost of providing live medical testimony at those hearings, where need has not been demonstrated by a request for a subpoena, over and above the cost of examinations requested by hearing examiners, would be a substantial drain on the trust fund and on the energy of physicians already in short supply. Id., at 406. (emphasis added)

Due process and justice require hearings for claimants. Plaintiff has confidence that this Court will insist on such procedures.

POINT III

CONTRARY TO DEFENDANTS' ASSERTION, PLAINTIFF'S CLAIM WITH RESPECT TO THE ILLEGALITY OF THE 90/10 RULE WAS RIPE FOR ADJUDICATION AT TRIAL

The District Court, in deciding plaintiff's 90/10 rule claim on the merits, reversed its earlier decision at trial and found the matter ripe* for adjudication. Plaintiff agrees with this determination.

The question of whether a case is sufficiently ripe to be decided by a court involves evaluation of its facts and circumstances:

> Justiciability is of course not a legal concept with a fixed content susceptible of scientific verification. Its utilization is the resultant of many subtle pressures, including the appropriateness of the issues for decision by this Court and the actual hardship to the litigants of denying them the relief sought."
> Poe v. Ullman, 367 U.S. 504 at 508-9 (1961).

The policy underlying the ripeness doctrine is composed of several elements. The courts' desire to avoid premature adjudication of constitutional issues, and to refrain from deciding the validity of state and federal statutes before absolutely necessary is inapposite here. See e.g., Poe v. Ullman, supra, at 506. No constitutional issues are presented by the plaintiff's claims, nor is the legitimacy of state or federal legislation in question.

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*Judge Bartels' mention of no controversy was clearly a reference to ripeness (A-249).

More relevant to this case is the requirement for "concreteness." Courts need concrete facts to confine their decisions and to bring the issues into sharper focus. Id, at 505; Communist Party of the United States v. Subversive Activities Control Board, 367 U.S. 1, 72 (1961). The present case alleges sufficient facts upon which the court can rest its determination: plaintiff, suffering from diabetes and a resultant visual impairment no longer feels capable of performing his job and ceased work. He is thus ineligible for a retirement pension from the defendant fund since he has not and will not be able to meet the requirement of the 90/10 rule (A-133)*

Therefore, defendants' denial of a pension to plaintiff at age 60 is a certainty since defendants' action is mandatory and not discretionery under the terms of the plan. Fitzgerald v. McChesney, 336 F.2d 905 (D.C. Cir., 1964). Plaintiff's rights to the pension are fixed at this time under the provision which plaintiff challenges. No further facts are necessary to concretize the denial of plaintiff's pension benefits under the provisions of the plan applicable to him and no change in his status can occur in the future.

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*Since plaintiff has been out of work for a sufficiently long period of time (a break in service), even if he were able to return to work his prior 16 years of service would be voided and he would have to comply with the pension requirements now in effect for new participants - 20 years service. Since plaintiff is now in his mid-fifties, he could not meet this requirement.

Federal courts will grant declaratory relief if the parties would suffer hardship if such relief were postponed. Relief has been granted even though further events were necessary to bring the issues to full maturity. Thus, in Pierce v. Society of Sisters, 268 U.S. 510 (1923), the Court held the dispute ripe for adjudication even though the challenged statute was not to take effect for several years. Cf. Lake Carriers Association v. MacMullan, 406 U.S. 498 (1972).

Broad attacks on the validity of legislation has been permitted by the courts even though the facts were not fully developed. Thus, in Times Film Corp. v. City of Chicago, 365 U.S. 43 (1961) the court permitted the plaintiff to challenge the basic authority of the censor, although the plaintiff had not submitted the film he wished to show to the censors' inspection, nor were the contents of the film in the record. The case involved the adjudication of absolutes, and the plaintiff's case was thus as ripe as could be required. See Bickel, The Least Dangerous Branch at 133-5.

Plaintiff contends that the present case has sufficiently concrete facts for an adjudication on the merits. Plaintiff's claim involves an absolute challenge to an eligibility requirement in the defendant retirement fund. Plaintiff contends that the rule is invalid because it is not designed for the sole and exclusive benefit of the employees. No

further facts as to plaintiff's involvement are necessary for a determination of this claim. See also Lake Carriers Association v. MacMullan, supra (challenge to state anti-pollution standards as pre-empted by federal law, although federal standards had not yet been set).

Further, it is clear that the plaintiff's claim with respect to a disability pension is ripe and thus properly before the court for adjudication. As plaintiff has previously explained, disability and retirement pensions under the defendant retirement plan have certain interdependent traits (see Appellant's Brief, p. 22; and, A-411-412). Since these claims are interrelated, logic and judicial efficiency and economy mandated that a decision on both be reached at trial.

In addition, it is clear that postponement of relief would seriously affect plaintiff. Plaintiff should not be forced to wait until he has attained age 60 only to again endure the long wait from the filing of his claim to a final determination of the validity of the 90/10 rule. Plaintiff has already waited more than three years for the resolution of this claim. An immediate determination will ensure that should the 90/10 rule be invalidated, plaintiff's pension will commence at age 60, not at age 63 or 64.

Finally, plaintiff accepted a pension plan from his employer in order to have future security. As do all union members, the plaintiff accepted the plan in lieu of present higher wages. Since plaintiff must now attempt to provide security

for his future (whether or not he is able to work), he has a current interest in his rights to a pension and a corresponding right to an immediate determination as to what his pension rights are.

CONCLUSION

For all the reasons set forth above, this Court should reverse the decision of the district court and grant plaintiff judgment: (1) ordering defendants to establish new procedures for the determination of claims consonant with elemental requirements of fairness, and to re-determine plaintiff's claim for a disability pension by use of these new procedures; and (2) declaring that defendants' 90/10 rule is illegal and unenforceable in that it violates §302(c)(5) of the Taft-Hartley Act, 29 U.S.C. §186(c)(5); and enjoining defendants from requiring plaintiff to meet the requirements of said rule in order to qualify for a standard (retirement) pension.

Dated: New York, New York
August 25, 1975.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
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JUAN SANCHEZ LUGO,

Appellant,

-against-

THE EMPLOYEES RETIREMENT FUND OF THE ILLUMINATION PRODUCTS INDUSTRY, et. al,

Appellees.

AFFIDAVIT OF SERVICE BY MAIL

Docket No. 75-7128

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

MICHAEL ASEN , being duly sworn, deposes and says that deponent is not a party to this action, is over 18 years of age and resides at 27 Montgomery Place, Brooklyn, New York.

That on the 25 day of August , 1975, deponent served the within Appellant's Reply Brief

upon Menagh, Trainor & Rothfeld, at
130 East 40th Street
New York, New York

the address(es) designated by said attorney(s) for that purpose by depositing a true copy of same enclosed in a postpaid, properly addressed wrapper, in an official depository under the exclusive care and custody of the United States Post Office Department within the State of New York.

Sworn to before me this
25 day of August , 1975.

NOTARY PUBLIC

DAVID S. PREMINGER
NOTARY PUBLIC, STATE of NEW YORK
No. 4509669
QUALIFIED in NEW YORK COUNTY
COMMISSION EXPIRES MARCH 30, 1977

MICHAEL ASEN